Supreme Court, U.S.
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No. 04-1249

IN THE

Supreme Court of the United States

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO,

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Circuit properly applied *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987) to the unique facts of this case?

CORPORATE DISCLOSURE STATEMENT

Respondent, Continental Airlines, Inc., has *no parent* corporation and no publicly held corporation owns 10% or more of Respondent's stock.

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I

STATEMENT OF THE CASE

A. *Course of Grievance Proceeding, Settlement, Arbitration, and Disposition in the Courts Below*

Continental Airlines, Inc. ("Continental") first terminated the employment of commercial aircraft mechanic Mark Johnson ("Johnson") for reporting to work with a breath alcohol level of 0.115. Johnson's intoxication level was nearly six times the level at which federal regulations mandated his immediate removal from the workplace[1] and was discovered only through the happenstance of a Department of Transportation ("DOT") mandated random drug and alcohol test.

The International Brotherhood of Teamsters ("IBT") grieved Johnson's discharge from his safety-sensitive position under the grievance procedures of the collective bargaining agreement ("CBA") between Continental and the IBT local union. Rather than pursue Johnson's discharge to arbitration under the CBA, IBT settled the grievance by entering into a last chance agreement ("LCA") that, among other things, provided for Johnson's conditional reinstatement subject to strict conditions concerning use of alcohol. These conditions included an assessment for alcohol dependency and Johnson's satisfactory completion of a course of rehabilitation, if determined necessary by Continental's Employee Assistance Program ("EAP") director.[2] After an individualized assessment, Continental's

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[1] 14 C.F.R. pt. 121, apps. I and J (2005).

[2] Continental's EAP director was the company's Substance Abuse Professional ("SAP") as required by federal regulations (Cont'd)

EAP director prepared a course of rehabilitation for Johnson for alcohol dependency, to which Johnson committed as a condition of continued employment (the "EAP Agreement"). Among other things, the EAP Agreement prohibited Johnson's use of any alcohol, including over-the-counter medications and substances, for one year. During the pendency of the EAP Agreement, and pursuant to the LCA, Johnson was conditionally reinstated to his safety-sensitive aircraft mechanic position. As a condition of the Agreements (the LCA and EAP Agreement are collectively referred to herein as "Agreements"),[3] Johnson delivered a prospective, undated letter of resignation to Continental's management to be used to terminate Johnson's employment should Johnson fail to comply with any provision of the Agreements. Discharge under the Agreements was not subject to the grievance provisions of the CBA. (Pet'r App. 60a, 64a.)

Just three months after signing the EAP Agreement, Johnson failed an on-duty, no-notice alcohol breath test required by the EAP Agreement. Continental accepted Johnson's letter of resignation terminating his conditional reinstatement to employment. Johnson made the tired excuse that it must have been the unverifiable "cough syrup."IBT

(Cont'd)
governing transportation employee rehabilitation programs. Federal law vests authority for drug and alcohol assessment, referral and monitoring of covered employees with this Substance Abuse Professional. *See* 49 C.F.R. § 40 (2004); 14 C.F.R. pt. 121, app. J, Section VI (C) (2005).

[3] Petitioner challenged the validity of the Agreements before the System Board of Adjustment, but as noted by Petitioner, the Board found both the LCA and EAP Agreement binding. (Pet. at 6.) The Fifth Circuit treated these as part of the same agreement for purposes of its decision. (Pet'r App. 7a, at n.4.)

appealed Johnson's second termination to the System Board of Adjustment (the "System Board")[4] as a minor dispute under the Railway Labor Act ("RLA").[5] The System Board found that Johnson consumed non-prescription alcohol and exhibited a "pathetic lack of knowledge of and commitment to what it takes to live a life of sobriety." (Pet'r App. 53a, 57a.) Despite these findings, the System Board concluded that Johnson did not violate the Agreements and awarded reinstatement with back pay (the "Award").

Continental filed an action for review and vacation of the Award in the district court alleging, in part, that (1) the System Board exceeded its authority when it ignored the express terms of the Agreements, (2) the System Board exceeded its authority and competency in substituting its judgment in place of Continental's SAP, and (3) reinstatement of an airline mechanic with a demonstrated propensity to work under the influence of alcohol violates public policy. Both parties moved for summary judgment. The district court granted the IBT's motion for summary judgment and ordered enforcement of the Award. (Pet'r App. 29a.)

Continental then moved to stay enforcement of the Award pending appeal. The district court found that "Continental

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[4] The three-member System Board was composed of two partisan members, a carrier representative (Dan O'Connor) and a union representative (James Hicks, Jr.), as well as a neutral arbitrator and chairman (John Flagler). (Pet'r App. 57a.) As a practical matter, the neutral arbitrator makes the decision and writes the Award.

[5] Continental arbitrated the question whether Johnson breached the Agreements before the System Board as a minor dispute under the RLA, but not through the CBA's grievance process as the Agreements, in the context of a "last chance" following settlement of a prior discharge grievance, rejected the CBA's grievance procedures. (Pet'r App. 23a.)

has presented a substantial case on the merits." (Resp't App. 3a.)[6] The district court noted that Continental also made a "forceful" public policy argument, "namely the risk involved in returning Johnson to his safety-sensitive aircraft mechanic's job notwithstanding the System Board's determination that Johnson showed a pathetic lack of knowledge and a lack of commitment to lead a life of sobriety." (Resp't App. 4a.) The court recognized that "Johnson has a demonstrated propensity to abuse alcohol and has reported to work as an airline mechanic while intoxicated" and that his return to work "would pose an unwarranted risk to the public and, under worse case assumptions, may result in disaster." (Resp't App. 5a.) Consequently, the district court stayed its own order enforcing the award. (Resp't App. 6a.)

Petitioner filed a motion to vacate the district court's stay in the Fifth Circuit. The Fifth Circuit refused to vacate the stay. (Resp't App. 1a.)

On November 15, 2004, the Fifth Circuit panel, in a unanimous opinion, reversed the district court and vacated the Award.[7] The Fifth Circuit refused to allow the System

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[6] Respondent's appendix will be cited "Resp't App. __."

[7] In arbitration proceedings before the Board of Adjustment, the arbitrator "shall have no authority to modify, amend, revise, add to or subtract from any of the terms or conditions of the Agreement." (Pet'r App. 69a.) Because the Fifth Circuit found that the System Board exceeded its authority when it ignored the express language of the Agreements, it did not reach Continental's other points of error: *i.e.*, (i) whether the System Board exceeded its authority and competency by substituting its judgment for that of Continental's (Cont'd)

Board to ignore the express terms of the Agreements. (*See* Pet'r App. 9a-12a.) On December 14, 2004, the Fifth Circuit denied Petitioner's petitions for rehearing and rehearing en banc. (Pet'r App. 13a-14a.)

B. *Petitioner's Misstatements*

Mindful of its obligations under Supreme Court Rule 15.2, Respondent notes for the Court Petitioner's misstatements in order to present a more complete Statement of the Case.

Petitioner misconstrues the facts in the record before the court of appeals by inaccurately representing that the panel "acknowledged that the record before it was silent on the question of whether or not the doctor instructed Johnson directly or indirectly through his medical staff." (Pet. at 14.) As a threshold point, the Fifth Circuit had before it a record establishing that "Johnson's doctor did not prescribe him medicine containing alcohol,"[8] not a record that is silent on this point.[9]

True, the court of appeals correctly notes the complete lack of evidence in *support* of a conclusion that either

(Cont'd)

EAP director/SAP, or (ii) whether the Award should be vacated because Johnson's reinstatement to a safety-sensitive job, notwithstanding his demonstrated propensity to work while intoxicated and the System Board's finding that he has "a pathetic lack of knowledge of and commitment to what it takes to live a life of sobriety," violates public policy. (*See* Pet'r App. 9a, 12a, 57a.)

[8] *See* Pet'r App. 12a.

[9] *See also infra,* part II-B, Reasons for Denying Petition.

Johnson or the doctor's office staff obtained the doctor's approval that Johnson use cough medicine with alcohol, or any cough medicine at all, for that matter. (Pet'r App. 11a.) But the record is not silent about the conduct of either Johnson or the doctor's office staff in this regard.

Johnson, in clear testimony elicited by Petitioner's lawyer on direct examination, testified that he spoke with his doctor's office staff, not his doctor, and that the staff told him they "could not give [Johnson] a prescription drug with not [*sic*] seeing the doctor." (Resp't App. 8a.) Johnson later reiterated that the staff refused to "prescribe medicine without [his] seeing the doctor." (Resp't App. 8a.) Thus, Johnson himself established that he did not speak with his doctor, only the office staff, and that his discussions with the office staff clearly established that the doctor would not prescribe medicine for Johnson without first examining him.

Nor does the System Board's written opinion make factual findings that Johnson's doctor, directly or indirectly, prescribed, considered or allowed Johnson to use cough syrup containing alcohol. On the contrary, the System Board found that "the Grievant's doctor did not 'prescribe' the particular medication in the technical sense that it involved a written prescription medication requiring the services of a licensed pharmacist. Neither did his doctor 'prescribe' a particular brand or type of cough medicine." (Pet'r App. 53a.) Thus, the System Board findings and the Fifth Circuit's view of the record are in accord: Johnson's doctor did not prescribe or approve use of cough syrup containing alcohol. (*See* Pet'r App. 11a-12a.)

As discussed *infra*, the Fifth Circuit vacated the Award because it is uncontroverted—as the System Board agreed—

that Johnson consumed alcohol that was not prescribed by a doctor. Johnson thus violated the express language of the EAP Agreement and the LCA. The System Board, by reading the requirements of "doctor" and "prescribe" out of the EAP Agreement, interpreted the Agreements in a manner that "is not an arguable construction." (Pet'r App. 11a-12a.)

REASONS FOR DENYING PETITION

I. This Case Does Not Merit Certiorari Because It Is A Fact Specific Application Of Well-Settled Law.

As articulated in Supreme Court Rule 10, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." Such petitions are granted "only for compelling reasons." SUP. CT. R. 10.

An issue must be "beyond the academic or episodic." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). This Court reviews issues of importance "to the public, as distinguished from" importance to the particular "parties" involved. *Layne & Bowler Corp. v. W. Well Works,* 261 U.S. 387, 393 (1923); *Rice,* 349 U.S. at 79.

This Court does "not grant [] certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925); *see also NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (noting that certiorari petitions presenting primarily fact questions do not merit Court review).

As Petitioner notes, the EAP Agreement's sole exception to Johnson's immediate discharge for use of alcohol during a one-year commitment period would be that Johnson's

doctor prescribed medicine containing alcohol. (Pet. at 5.) Here, Petitioner asks this Court to review the narrowest of questions, *i.e.*, whether the Fifth Circuit correctly determined that the System Board ignored the express terms of the Agreements in violation of *Misco* when applying this provision. Thus, to ascertain whether the Fifth Circuit's application of the law has been faithful to *Misco*, this Court would have to examine the factual record, the Agreements and the Award to determine whether the Fifth Circuit correctly determined that the Board of Adjustment ignored the plain terms of the Agreements, as it held.

This case does not concern a conflict with other courts of appeal on an "important matter." SUP. CT. R. 10(a). Moreover, the Agreements the Court must review were drafted to settle Johnson's earlier discharge grievance and to address Johnson's alcohol-dependent condition following an individualized assessment of his needs. These are circumstances so idiosyncratic as to apply to Johnson alone. It is, at best, extremely unlikely that any subsequent court will be called upon to consider an arbitral award involving a materially identical contract in the context of materially identical factual circumstances. Thus, any decision on the merits would offer extremely limited utility. Accordingly, review should be denied because this issue is important only to the parties involved, not the public. *See Layne & Bowler Corp.*, 261 U.S. at 393; *Rice,* 349 U.S. at 79.

The Court exercises its discretion to grant certiorari only when a court of appeals has conflicted with other courts of appeal on an "important matter" or "has so far departed from the accepted and usual course of judicial proceeding" that the Court is compelled to exercise its supervisory powers. SUP. CT. R. 10(a). "A petition for certiorari is rarely granted

when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. Petitioner concedes that the Fifth Circuit stated the correct legal standard and urges review only because, Petitioner contends, the standard was not applied correctly to the facts of this case. No issue worthy of certiorari is presented.

A. *The Fifth Circuit correctly applied Misco's principles in this case.*

1. *Misco* does not permit an arbitrator to disregard unambiguous contract terms.

In attempting to obtain review by the Court, Petitioner relies almost exclusively on the contention that the Fifth Circuit's decision conflicts with the Supreme Court's holdings in the *Steelworkers Trilogy*[10] and its progeny. (Pet. at 8.) This argument wholly lacks merit because the Fifth Circuit's decision is in conformance with the Court's jurisprudence.

Although arbitrators have wide latitude to enforce collective bargaining agreements, this latitude is not absolute. In *United Paperworkers International Union v. Misco, Inc.*, this Court stated: "The arbitrator may not ignore the plain language of the contract." 484 U.S. 29, 38 (1987). The Court reiterated this principle in *Eastern Associated Coal*: "[A]n arbitrator's award 'must draw its essence from the

[10] The Steelworkers Trilogy consists of *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).

contract and cannot simply reflect the arbitrator's own notions of industrial justice.'" *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000) (quoting *Misco*, 484 U.S. at 38). The Fifth Circuit was faithful to the following long-standing principles in vacating the Award:

> Courts do not uphold an arbitrator's decision when it dispenses its own "'brand of industrial justice'" outside the scope of an arbitration agreement. *Misco*, 484 U.S. at 36. Rather, courts may review an arbitrator's award "to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the [agreement]." *Delta Queen Steamboat Co. v. Dist. No. 2 Marine Eng'rs Beneficial Ass'n, AFL-CIO*, 889 F.2d 599, 602 (5th Cir. 1989). And, "[w]here an arbitrator exceeds his contractual authority, vacation or modification of the award is an appropriate remedy." *Id. See also Houston Lighting & Power Co. v. Int'l Bhd. of Elec. Workers, Local Union No. 66*, 71 F.3d 179, 184 (5th Cir. 1995) (holding that if the language of the applicable agreement is "clear and unequivocal, an arbitrator is not free to change its meaning"). In short, an "arbitrator may not ignore the plain language of the contract." *Misco*, 484 U.S. at 38.

Petitioner objects only to the application of *Misco's* principles to the facts of this case. However, the Fifth Circuit considered the Award within the framework set out by this Court in *Misco*. It determined that the System Board ignored the plain terms of the EAP Agreement requiring Johnson's immediate discharge from his safety-sensitive job if he used any alcohol or alcohol-containing substance during a one year rehabilitation period. The sole exception was in the event Johnson used a doctor-prescribed medication containing alcohol, and the System Board's own fact-findings made clear that a doctor did not so prescribe. Certiorari is not appropriate.

2. The Court's *Garvey* opinion is inapposite.

Because no split between the circuits is implicated on any "important matter," Petitioner seeks to establish that the decision below so far departs from the accepted and usual practice of a judicial proceeding, that this Court's intervention through exercise of its supervisory powers is compelled. To satisfy the high threshold at which the Court's supervisory oversight is warranted, Petitioner argues the decision below mimics the errors presented and addressed in *Major League Baseball Players Association v. Garvey*, 532 U.S. 504 (2001) (per curiam). (Pet. at 8, 12-13.) *Garvey*, however, is a far different case.

In *Garvey*, the court of appeals overturned an arbitral award for reasons completely different from the Fifth Circuit's reasoning below. Moreover, *Garvey* concerned the award of collusion damages to a professional baseball player under a claim framework applying potentially to a large pool of players. *Garvey's* holdings, therefore, necessarily reached well-beyond the parties in that case.

In *Garvey*, former professional baseball player Steve Garvey submitted a claim against a fund created by team owners in settlement with the players' union for the owners' unlawful collusion.[11] To recover damages, Garvey had to show that his former team offered a contract extension that

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[11] Between 1985 and 1987, Major League Baseball teams colluded to suppress player salaries in violation of the industry's collective bargaining agreement. *Garvey*, 532 U.S. at 505. The players' union filed several grievances against the teams, and arbitrators subsequently found the teams liable for collusion. *Id.* at 505-06. A framework, applicable to all players, was set up for players to make claims against the fund, which Garvey did.

was subsequently withdrawn because of collusion. *Garvey,* 532 U.S. at 506. The union rejected Garvey's claim because he failed to produce evidence that his former team, the San Diego Padres, had offered a contract extension. *Id.* Garvey moved for arbitral review. *Id.*

In making a factual finding about Garvey's claim of a proffered contract extension, the arbitrator considered two pieces of directly conflicting evidence, both emanating from Padres' CEO Ballard Smith: (a) Smith's testimony from the late 1980's collusion hearings where Smith denied collusion and stated that the Padres were simply not interested in extending Garvey's contract, and (b) Smith's 1996 letter stating he initially offered Garvey a contract extension but subsequently refused to negotiate an extension because of collusion. *Garvey,* 532 U.S. at 506-07. The arbitrator doubted the credibility of Smith's 1996 letter in light of his prior testimony adamantly denying collusion. *Id.* at 507. Because the arbitrator credited Smith's testimony in the prior collusion hearings, he concluded Garvey failed to prove a specific offer of an extension and entered an award for the union. *Id.*

Garvey moved to vacate the award. *Garvey,* 532 U.S. at 507. The district court denied relief. *Id.* On appeal, the Ninth Circuit reviewed the arbitrator's finding that Smith's 1996 letter lacked credibility in the face of Smith's earlier testimony. *Id.* at 508. The Ninth Circuit, disagreeing with the arbitrator's credibility assessment, determined that the record below provided "strong support" for the letter's truthfulness and held, directly contrary to the arbitrator's credibility finding, that Smith's prior testimony was not credible. *See id.* at 508. The divided panel ultimately vacated the award, directing the district court to remand the case to the arbitrator with instructions to enter an award for Garvey in the amount he claimed. *See id.*

The Court granted review and reversed because the Ninth Circuit's holding conflicted with the Court's cases mandating limited review of labor arbitration awards.[12] *Garvey,* 532 U.S. at 505. The Court found that the Ninth Circuit "overturned the arbitrator's decision because it disagreed with the arbitrator's decision, particularly those with respect to credibility." *Id.* at 510. The Ninth Circuit's disagreement with such factual findings, even if serious error, did not justify overturning an arbitral award if the arbitrator is "construing a contract and acting within the scope of his authority." *Id.*

Garvey is far different from the instant case. Unlike the Ninth Circuit in *Garvey*, the Fifth Circuit did not question the System Board's factual findings nor attempt to substitute its judgment for the System Board's assessment of the credibility of conflicting evidence. Indeed, there is no material factual conflict—both the System Board and the Fifth Circuit conclude that Johnson's doctor did not prescribe any medicine containing alcohol. (*See* Pet'r App. 12a, 53a.)

Instead, following *Misco* the Fifth Circuit had to decide whether the System Board exceeded its contractual authority by ignoring express terms of the EAP Agreement. *See Misco,* 484 U.S. at 38. The Fifth Circuit vacated the Award because the System Board, despite finding that no doctor prescribed Johnson any medicine containing alcohol, ignored the plain language of the EAP Agreement that the sole, narrow exception to Johnson's immediate discharge for use of alcohol during his course of rehabilitation was medicine containing alcohol prescribed by a doctor. Nothing else

[12] The Court also granted review because it found the Ninth Circuit erred in directing the arbitrator to enter judgment in favor of Garvey for the amount claimed, without further proceedings before the arbitrator. *Garvey,* 532 U.S. at 505.

qualifies. Although it made a factual finding that Johnson's doctor did not prescribe him medicine containing alcohol, which should have required Johnson's discharge, the System Board characterized the prescription-requirement as "highly technical," refusing to impose the parties' mandated remedy for such a violation: termination of employment.[13] (Pet'r App. 53a.) The System Board thereby ignored the contract terms and dispensed its own brand of industrial justice. *Garvey*, unlike this case, never addressed whether the arbitrator exceeded its authority by ignoring an unambiguous contractual term. *See Garvey,* 532 U.S. at 509-11.

Because the Fifth Circuit's decision does not implicate *Garvey's* facts or legal reasoning and in no way mimics the errors of that case, Petitioner's argument that the Fifth Circuit decision here similarly compels the Court's supervisory intervention is completely misplaced.

B. *The Fifth Circuit routinely and correctly applies Misco to affirm labor arbitration awards.*

Petitioner maintains the Fifth Circuit's decision below "manifests a continuing infidelity to the controlling precedents of this Court mandating only limited review" of arbitral awards under the RLA. (Pet. at (i).)

Petitioner cites the Fifth Circuit's decision in *American Eagle* as evidence of its "ever-developing refusal to adhere to this Court's jurisprudence." (Pet. at 16.) Petitioner even goes so far as to allege that the Fifth Circuit has essentially employed a "de novo" standard of review. (*Id.*) Petitioner failed to disclose, however, that the Court considered and

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[13] *See also infra,* part II, Reasons for Denying Petition.

denied certiorari there. *Am. Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 343 F.3d 401 (5th Cir. 2003), *cert. denied*, 541 U.S. 935 (2004). Petitioner also failed to acknowledge the great weight of authority demonstrating the Fifth Circuit's recent and consistent adherence to *Misco*.

The Fifth Circuit is hardly a rogue court. Instead of subverting *Misco*, the Fifth Circuit consistently exhibits great deference to arbitration awards by refusing to overturn them.[14] Further, the Fifth Circuit routinely reverses district

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[14] Recent examples of deferential treatment to arbitration awards include: *Pioneer Natural Res. USA v. Paper, Allied Indus., Chem. & Energy Workers Int'l Union, Local 4487*, 328 F.3d 818 (5th Cir. 2003) (affirming award for period before Union was decertified as collective bargaining representative); *Int'l Chem. Workers Union, Local 683c v. Columbian Chems. Co.*, 331 F.3d 491 (5th Cir. 2003) (affirming award because arbitrator neither acted in manifest disregard for the law nor dispensed his own brand of industrial justice); *Weber Aircraft Inc. v. Gen. Warehousemen & Helpers Union Local 767*, 253 F.3d 821 (5th Cir. 2001) (affirming award requiring reinstatement); *Atchison, T. & S.F. Ry. Co. v. United Transp. Union*, 175 F.3d 355 (5th Cir. 1999) (affirming award requiring reinstatement of a railroad yardman based upon arbitrator's factual finding that the company's drug testing procedure was inadequate); *UFCW, Dist. Local Union 540 v. Pilgrim's Pride Corp.*, 193 F.3d 328 (5th Cir. 1999) (affirming award that applied collective bargaining agreement and did not exceed authority under *Misco's* deferential review standard); *Nat'l Gypsum Co. v. Oil, Chem., & Atomic Workers Int'l Union*, 147 F.3d 399 (5th Cir. 1998) (affirming award under *Misco* analysis); *Six Flags Over Tex., Inc. v. IBEW, Local No. 116*, 143 F.3d 213 (5th Cir. 1998) (affirming award where arbitrator acted within scope of authority); *United Food & Commercial Workers v. Nat'l Tea Co.*, 899 F.2d 386 (5th Cir. 1990) (affirming award where arbitrator acted within scope of authority); *Folger Coffee Co. v. Int'l Union, United Auto., Aerospace & Agric. Workers Local 1805*, 905 F.2d 108 (5th Cir. 1990) (Cont'd)

courts for improperly overturning an arbitration award.[15] Accordingly, there is no need for the Court to intervene to correct any alleged misunderstanding of the well-settled principle of judicial deference to labor arbitration awards. Petitioner's apparent disagreement with the result in

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(Cont'd)
(affirming award that drew its essence from collective bargaining agreement); *Smith v. Alumax Extrusions, Inc.*, 868 F.2d 1469 (5th Cir. 1989) (affirming district court denial of motion to vacate); *Gen. Drivers, Warehousemen & Helpers Local Union 968 v. Sysco Food Servs., Inc.*, 838 F.2d 794 (5th Cir. 1988) (finding that arbitrator did not exceed his jurisdiction); *Oil, Chem. & Atomic Workers Int'l Union Local 40288 v. Union Oil Co.*, 818 F.2d 437 (5th Cir. 1987); *Manville Forest Prods. Corp. v. United Paperworkers Int'l Union*, 831 F.2d 72 (5th Cir. 1987) (affirming district court's enforcement of award).

[15] Examples of the Fifth Circuit reversing trial courts to enforce erroneously vacated arbitration awards include: *Teamsters Local No. 5 v. Formosa Plastics Corp.*, 363 F.3d 368 (5th Cir. 2004) (reversing district court and upholding arbitrator's decision regarding timeliness of grievance filing); *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346 (5th Cir. 2004) (reversing district court because arbitrator not in manifest disregard of the law); *Weber Aircraft, Inc. v. Gen. Warehousemen & Helpers Union Local 767*, 253 F.3d 821 (5th Cir. 2001) (reversing judgment and enforcing award where reinstating employee did not contradict dominant public policy); *United Food & Commercial Workers v. Nat'l Tea Co.*, 899 F.2d 386 (5th Cir 1990) (reversing district court and enforcing award based upon arbitrator's interpretation of contract); *Dixie Mach. Welding & Metal Works, Inc. v. Int'l Bhd. of Boilermakers, Local 37*, 867 F.2d 250 (5th Cir. 1989) (reversing district court and enforcing award interpreting disputed aspects of old contract); *Oil, Chem. & Atomic Workers Int'l Union Local 40288 v. Union Oil Co.*, 818 F.2d 437 (5th Cir. 1987) (reversing district court and remanding to arbitrator when arbitrator's factual assumption about repeat drug use was proven wrong).

American Eagle is not a reason to grant certiorari here, a case that correctly sets forth the applicable law and, at most, concerns a narrow dispute whether the Fifth Circuit correctly applied *Misco* but has no substantive importance to this Court's developing jurisprudence or any supervisory oversight role.

II. Review Should Be Denied Because The Fifth Circuit Reached The Correct Result.

A. *The Fifth Circuit correctly reversed the System Board for ignoring the express terms of the Agreements.*

Recognizing the correct standard of review, the Fifth Circuit exercised its power to enforce the jurisdictional limits imposed on the System Board by the Agreements, *i.e.*, it proceeded to determine whether the System Board exceeded its jurisdiction by ignoring the plain terms of the Agreements. (Pet'r App. 9a-12a.)

Contrary to Petitioner's argument, the System Board did not "interpret" the Agreements by reinstating Johnson after he violated its terms. Rather, the System Board re-wrote the Agreements to justify what it thought was "fair." Thus, the System Board exceeded its contractual authority by flatly ignoring the Agreements' sole, contractual remedy of termination, which was specifically mandated for any non-prescription use of alcohol, including any over-the-counter medications and substances. (*See* Pet'r App. 53a, 63a-634a.) The Award did not draw its essence from the Agreements.[16]

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[16] Generally, an award exceeds the scope of a labor agreement where: "(1) the award conflicts with the express terms of the agreement, (2) the award imposes additional requirements that are

(Cont'd)

Notwithstanding the broad deference owed to arbitrators, *Misco* and its progeny do not allow unbridled discretion by the System Board. *See Misco*, 484 U.S. at 38 ("The arbitrator may not ignore the plain language of the contract.")

B. *The record is uncontroverted that no doctor prescribed the alcohol Johnson used and that the Agreements required Johnson's discharge for non-prescription use of alcohol.*

The System Board excused Johnson's admitted use of alcohol by concluding that the use of cough syrup generally was "approved" by Johnson's doctor and then equating "approval" (Pet'r App. 53a) with the narrowly-stated EAP exception for "doctor prescribe[d] medication." (Pet'r App. 63a.) The substitution of "approval" of unspecified cough syrup by the doctor's office staff for "doctor-prescribed" medicine containing alcohol clearly rewrites the Agreements, which expressly forbid Johnson from consuming any alcohol. (*Id.*) Only "doctor-prescribe[d] medication" was potentially permitted if properly disclosed.[17] (*Id.*) Johnson testified that

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(Cont'd)
not expressly provided in the agreement, (3) the award is without rational support or cannot be rationally derived from the terms of the agreement, or (4) the award is based on general considerations of fairness and equity rather than the precise terms of the agreement." *Airline Prof'ls Ass'n v. ABX Air, Inc.*, 274 F.3d 1023, 1030 (6th Cir. 2001).

[17] The System Board found that Johnson attempted to inform the EAP director of the cough syrup once he "discovered that the medication contained alcohol." (Pet'r App. 52a-53a.) This finding is curious in light of Johnson's own testimony that he had no idea the medicine contained alcohol when he called the EAP director. (*See* Resp't App. 9a.)

he spoke with his doctor's office (not his doctor) and was told that they could not "prescribe medicine without [his] seeing the doctor." (Resp't App. 8a.) The System Board itself, in the Award, even finds that:

> [T]he Grievant's doctor *did not "prescribe"* the particular medication in the technical sense that it involved a written prescription [of] medication requiring the services of a licensed pharmacist. *Neither did his doctor "prescribe"* a particular brand or type of cough medicine.

(Pet'r App. 53a (emphasis added).)

In the face of uncontroverted evidence that Johnson asked for and was denied doctor-prescribed medication, the System Board's supplanting of "doctor prescribe[d] medication" with "securing his doctor's approval," plainly ignores the unambiguous language of the Agreements. In the words of *Misco*, the System Board was dispensing its own "notion[] of industrial justice." *See Misco*, 484 U.S. at 38.

The System Board also concluded that Johnson "met the letter and the spirit" of the Agreements under the following rationale:

> The fact that the doctor approved the use of a cough medicine, however, surely means that the Grievant did not take it upon himself to somehow circumvent the purpose of the Last Chance requirements by unsupervised self-medication.

(Pet'r App. 53a.) However, the EAP Agreement, which was Johnson's course of rehabilitation for alcohol dependency

prepared by the Substance Abuse Professional following an individualized assessment of Johnson's condition, never had the purpose of preventing "unsupervised self-medication." To the contrary, Johnson could medicate himself however and whenever he chose so long as he did not use medicine *containing alcohol* without first obtaining a doctor's prescription and making proper disclosure.[18] Having made the factual finding that Johnson obtained no doctor's prescription for any medication nor for any particular cough syrup—let alone one containing alcohol, the System Board's failure to enforce the plain terms of the EAP Agreement exceeded its jurisdiction.[19] To treat a telephone discussion with a doctor's office staff regarding unspecified over-the-counter cough syrup as the equivalent of doctor-prescribed medicine containing alcohol, substitutes the System Board's brand of industrial justice for the result agreed upon by the parties as specified by the unambiguous terms of the Agreements.

Once the System Board found Johnson consumed alcohol that was not prescribed by a physician, it had no authority to

[18] "Prescription" is defined as "a direction, usually written, by the physician to the pharmacist for the preparation and use of a medicine or remedy." *Random House Compact Unabridged Dictionary* 1529 (2d ed. 1996). By way of contrast, "over the counter" means "without a doctor's prescription but within the law." *Id.* at 1386.

[19] According to evidence before the System Board, "doctor approval" means nothing more than a diagnosed alcoholic's informal, undocumented, and unverifiable discussions with doctor's office staff about unspecified brands of over-the-counter cough syrup. (*See* Resp't App. 8a.) Frankly, this is exactly the insidious sort of excuse for use of alcohol (and for a .029 on-duty breath alcohol concentration) that the EAP Agreement's strict requirements against any use of non-prescription alcohol were designed to prevent.

ignore the result called for by the Agreements. *See Misco,* 484 U.S. at 38 (holding that the "arbitrator may not ignore the plain language of the contract"). Through the plain terms of the Agreements, particularly the EAP director's very narrow safe harbor from immediate discharge for use of alcohol under the EAP Agreement, the parties themselves set the remedy for a violation. The System Board's sole authority was to enforce the express terms as written, whether it liked the outcome or not. *See id.*

The System Board found that Johnson's doctor did not prescribe him medicine containing alcohol. (Pet'r App. 53a.) The Agreements prohibited any non-prescribed use of alcohol by Johnson, so the Fifth Circuit properly applied *Misco* and vacated the Award to give effect to the language selected by the parties because *Misco* does not permit an arbitrator to disregard express contractual terms. *See Misco*, 484 U.S. at 38.

CONCLUSION

This case is significant to Continental for the safety implications when an arbitrator returns an alcohol-dependent aircraft mechanic, who *already* is in an alcohol rehabilitation program as a "last chance," to work on passenger aircraft after *again* coming to work with alcohol in his system under the tired excuse that it must have been the "cough syrup." But this case is insignificant to the jurisprudence of the Court. It concerns neither a dispute between circuits on an important legal issue nor any manifest disregard by the Fifth Circuit for this Court's jurisprudence. Instead, the Fifth Circuit applied well-settled law in vacating the System Board's award, consistent with *Misco*. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED APRIL 15, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-20136

CONTINENTAL AIRLINES INC.

Plaintiff - Counter Defendant - Appellant

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Defendant - Counter Claimant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

Before SMITH, DeMOSS, and STEWART, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to vacate the District Court's Order of February 9, 2004, is DENIED.

IT IS FURTHER ORDERED that appellee's alternative motion to expedite the appeal is GRANTED.

s/ [initials of Circuit Judges]

APPENDIX B — ORDER GRANTING STAY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION FILED FEBRUARY 10, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-03-817

CONTINENTAL AIRLINES, INC.,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Defendant.

ORDER GRANTING STAY

Plaintiff Continental Airlines, Inc. ("Continental") has moved to Stay Enforcement of Arbitration Award Pending Appeal (Document No. 23), pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. After having carefully reviewed the motion, Defendant's Response in opposition, reply, arid applicable law, the Court concludes that the motion should be granted.

An application under Rule 62(c) is addressed to the discretion of the Court, but the Court is required to examine certain factors: (1) whether the movant has made a showing

of likelihood of success on the merits; (2) whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether the granting of the stay would substantially harm the other parties; and (4) whether the granting of the stay would serve the public interest. *Hilton v. Braunskill*, 107 S. Ct. 2113, 2119 (1987); *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992); 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, § 2904, 501 (1973). In cases where the movant presents a serious legal question, a movant need not always show a "probability" of success on the merits. *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). In such instances, a movant need only present a substantial case on the merits and show that the balance of equities weighs heavily in favor of granting the stay. *Id.*; *see also Wildmon*, 983 F.2d at 23. "[I]f the balance of equities (i.e., consideration of the other three factors) is not heavily tilted in the movant's favor, the movant must then make a more substantial showing of likelihood of success on the merits in order to obtain a stay pending appeal." *Ruiz*, 650 F.2d at 565-66.

First, the Court finds that serious legal questions are involved in this case, which were addressed at length in its Memorandum and Order. The case also implicates serious and important public safety concerns regarding alcohol use while engaged in safety-sensitive work in the airline industry. *Cf. Wildmon*, 983 F.2d at 23-24 (finding no serious legal issue involved where the dispute had no "public concerns"). Further, Continental has presented a substantial case on the merits.

Appendix B

Given that serious legal questions are presented by this case and that Continental has presented a substantial case on the merits, the Court must balance the equities. Continental states that it will be irreparably injured if Continental is successful on appeal but in the meanwhile has paid all of the back wages and benefits to the employee Johnson who, after reversal of this Court's judgment, may have expended the funds and not have the resources to repay Continental. Continental also argues that there would be no detriment to Johnson because Continental's liability to him would continue to accrue, and he, at the end of the day if the Union prevails on appeal, would have full recompense for his injury. Continental makes a particularly forceful argument with regard to the public interest, namely the risk involved in returning Johnson to his safety-sensitive aircraft mechanic's job notwithstanding the System Board's determination that Johnson showed a pathetic lack of knowledge and a lack of commitment to lead a life of sobriety.

The Union, on the other hand, responds that Johnson has been out of work for some three years and is without medical treatment, that his wife is currently on a list of organ transplantation and her ability to qualify may be endangered by a lack of medical coverage, and that Johnson and his wife may well suffer irreparable injuries and substantial harm if the judgment is stayed. The Union states further that Continental's payment of backpay to Johnson would not result in irreparable loss to Continental within the meaning of the law because a judgment for monetary damages can satisfy Continental's injury. The Union has presented no evidence, however, that Johnson is capable of satisfying a judgment for damages of such size to prevent Continental's loss from being irreparable.

Appendix B

There is no evidence to substantiate the Union's contentions regarding Mrs. Johnson's medical condition or health care coverage, but assuming the truth of such assertions, a spouse's medical condition, even while serious, is still collateral or peripheral to this employment dispute in which she is not involved. There is no showing that Johnson himself would suffer any irreparable or even appreciable injury if a stay is issued. Continental, as has been seen, is vulnerable to irreparable loss if a stay is not granted. In fact, if a stay does not issue and Continental is successful on appeal, its irreparable injury may consist not only of three years of back wages and benefits it pays to Johnson and may not recoup but also the incalculable damage to its operations in having to guard against Johnson's potential errors if he resumes alcohol abuse on the job.

Indeed, most compelling are the public policy concerns that strongly favor the granting of a stay in this most troubling situation. Johnson has a demonstrated propensity to abuse alcohol and has reported for work as an airline mechanic while intoxicated. If this Court has erred in its judgment and is reversed by the Court of Appeals, then Johnson's return to work as a commercial airline mechanic engaged in safety-sensitive work during pendency of the appeal would pose an unwarranted risk to the public and, under worse case assumptions, may result in a disaster. The balance of equities therefore weighs heavily in favor of a stay of this Court's judgment until it has been reviewed on appeal. It is therefore

ORDERED that Continental's Motion to Stay Enforcement of Arbitration Award Pending Appeal (Document No. 23) is GRANTED and enforcement of the

Appendix B

Court's Memorandum and Order, and its Final Judgment, both entered January 8, 2004, is STAYED pending Continental's timely prosecution of an appeal to the United States Court of Appeals for the Fifth Circuit.

The Clerk shall notify all parties and provide them with a signed copy of this Order.

SIGNED at Houston, Texas, on this 9th day of February, 2004.

s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — EXCERPTS OF EXAMINATION OF MARK JOHNSON DURING ARBITRATION PROCEEDINGS DATED SEPTEMBER 24, 2002

Arbitration Proceedings – Mark Johnson
September 24, 2002

CONTINENTAL AIRLINES, INC.

PILOTS' SYSTEM BOARD OF ADJUSTMENT

GRIEVANCE NO. CAL-IBT
01-020
Mark Johnson

CONTINENTAL AIRLINES, INC.,

Company,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Union.

TAKEN AT: Sheraton North Houston Hotel
15700 John F. Kennedy Blvd.
Houston, Texas 77032

DATE: September 24, 2002
TIME: 10:00 a.m.

Appendix C

* * *

Mark Johnson - September 24, 2002
Direct Examination by Mr. Hicks

Q. When were you able to make an appointment for?

A. It wouldn't be till Friday, the following Friday.

Q. And did you talk with the doctor's staff about what you could do in the meantime?

A. Yes, sir, I did.

Q. What did they recommend to you?

A. I did Tuesday, they recommended from my case. They could not give me a prescription drug with not seeing the doctor. I told them about my allergies and then I had flu-like symptoms and certain symptoms that were pertaining which were going on, and told them my case as far as with Continental, and they said, well -- I told them could I take this, that, and the other, and they said yes, until -- that will be fine until you get to the office before we can prescribe the medicine for you. We can't do it -- could not give me -- prescribe medicine without seeing the doctor.

Q. Did they make any recommendations as to any over-the-counter drugs?

A. Yes, they said to go ahead, cough medicine.

Appendix C

Q. Did you obtain some cough medicine?

A. Yes, I did.

* * *

Mark Johnson - September 24, 2002
Cross-Examination by Mr. Wall

Q. (BY MR. WALL) So is it true that you called Steve Skidmore because you knew that the cough medicine had alcohol in it?

A. No. I called Steve Skidmore to let him know that I was taking something, ingesting something for my cough, my congestion. Whether it be, I don't care, aspirin or whatever, I was required to tell Steve, the EAP, what I was taking other than Coca Cola or water or iced tea.

Q. Okay, let me ask this again. And again, most of these questions you only have to answer yes or no. Did you know when you took the cough medicine that it had alcohol in it?

A. No, I didn't even -- no.

Q. Did you think that was important to know whether it did?

A. Pretty much. It was given to me by her. I told him this is what I was on. I didn't --

* * * *